



ATTORNEY GENERAL OF MISSOURI
ERIC SCHMITT

May 19, 2021

The Honorable Miguel Cardona
Secretary of the Department of Education
United States Department of Education
400 Maryland Ave, S.W.
Washington, DC 20202

Re: Proposed Priorities—American History and Civics Education, 86 Fed. Reg.
20,348

Dear Secretary Cardona,

The proposed priorities under consideration by the U.S. Department of Education will unlawfully and unconstitutionally fund initiatives that promote racial discrimination, instead of providing civics lessons that enable students of all races and backgrounds to effectively participate in their government as part of the Constitution's "We the People." It is particularly disheartening to see the Department explicitly endorse so-called "anti-racist" ideas in Proposed Priority 1. These ideas are nothing new, and they directly contradict the Secretary's statutory authorization "to carry out an American history and civics education ... by educating students about the history and principles of the Constitution of the United States, including the Bill of Rights," and to improve "the quality of the teaching of American history, civics, and government in elementary schools and secondary schools, including the teaching of traditional American history." 20 U.S.C. § 6661(a).

This statute reflects Congress's insight that the United States of America is unique, as the first nation in history to be founded on ideals of liberty and equality under law. Ronald Reagan often quoted Puritan leader John Winthrop, who stated of America in 1630: "We must consider that we shall be as a city upon a hill. The eyes of all people are upon us." America's founding ideals have served as a "city

on a hill” to people and governments all over the world, inspiring freedom, justice, and equality under the law. Yet the Department’s proposal would give no weight to the greatest ideals in American history, expressed in the Declaration of Independence, the Constitution, the Bill of Rights, the Gettysburg Address, the Emancipation Proclamation, Lincoln’s Second Inaugural Address, the Fourteenth Amendment, Martin Luther King Jr.’s “I Have a Dream” speech, and other great foundational documents of American history.

Our Constitution guarantees equal protection to every person under law without regard to race, and it requires all “governmental actor[s] subject to the Constitution [to] justify *any racial classification* subjecting that person to unequal treatment under the strictest of judicial scrutiny.” *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (emphasis added). Justice Harlan’s dissent in *Plessy v. Ferguson* famously stated that “our Constitution is color-blind.” *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Yet Proposed Priority 1 states that “schools across the country are working to incorporate antiracist practices into teaching and learning,” and it cites with approval Ibram X. Kendi’s book *How To Be an Antiracist*. 86 Fed. Reg. 20,349 & n.3. Professor Kendi openly derides the proposition that “[o]ur Constitution is color-blind,” stating that “[t]he language of color-blindness ... is a mask to hide racism.” Ibram X. Kendi, *How To Be an Antiracist* 9 (New York, One World, 2019) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). It is not plausible to characterize Professor Kendi’s teachings—which attack the very foundations of the Constitution and the Bill of Rights—as “educating students about the history and principles of the Constitution of the United States, including the Bill of Rights,” or improving “the quality of the teaching of American history, civics, and government in elementary schools and secondary schools, including the teaching of traditional American history.” 20 U.S.C. § 6661(a).

On the contrary, Professor Kendi’s doctrines contradict the Department’s statutory obligations and the U.S. Constitution. According to Professor Kendi, an antiracist is “[o]ne who is supporting an antiracist policy through their actions or expressing an antiracist idea,” and a racist is “[o]ne who is supporting a racist policy through their actions or inaction or expressing a racist idea.” Kendi, *How To Be an Antiracist*, *supra*, at 13. Under his framework, “there is no neutrality in the racism struggle,” because “[t]he claim of ‘not racist’ neutrality is a mask for racism.” *Id.* at 9. In similarly absolute terms, Professor Kendi defines racial inequity as “when two or more racial groups are not standing on approximately equal footing,” and he defines a “racist policy” as “any measure that produces or sustains racial inequity

between racial groups.” *Id.* at 17. On his view, “[t]here is no such thing as a nonracist or race-neutral policy.” *Id.*

Professor Kendi’s absolutist view endorses overt racial discrimination: “The only remedy to racist discrimination is antiracist discrimination.” *Id.* at 19. He contends that, “if racial discrimination is defined as treating, considering, or making a distinction in favor or against an individual based on that person’s race, then racial discrimination is not inherently racist.” *Id.* at 18-19. For him, the key question is “whether the discrimination is creating equity or inequity.” As a result, past discrimination must be remedied with present discrimination and present discrimination must be remedied with future discrimination. *Id.* at 19. He posits that the “most threatening racist movement is ... the regular American’s drive for a ‘race neutral’” society. *Id.*

In addition to violating the Department’s statutory mandate, these ideas are fundamentally at odds with at least two core constitutional principles. *First*, under the Equal Protection Clause, “racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (quoting *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)). “Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people, and therefore are contrary to our traditions and hence constitutionally suspect.” *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 309 (2013) (quotations and citations omitted). This applies to even so-called “benign” racial discrimination—if such a thing exists—because “[n]othing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups.” *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 298 (1978) (opinion of Powell, J.). Professor Kendi’s explicit call to remedy discrimination with more discrimination violates these fundamental principles. Professor Alexander Bickel has aptly described the contradiction inherent in such views:

The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found

support in the Constitution for equality, they now claim support for inequality under the same Constitution.

A. BICKEL, *THE MORALITY OF CONSENT* 133 (1975) (cited in *Bakke*, 438 U.S. 265, 295 n.35). Thus, the Constitution instructs that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Parents Involved*, 551 U.S. at 748.

Second, teaching schoolchildren Professor Kendi’s view that *mere inaction* brands one a “racist” violates core First Amendment principles. The First Amendment reflects “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Supreme Court precedents recognize “that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.” *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Thus, the government cannot compel the pledge of allegiance or even respect for the flag, and the First Amendment protects a variety of speech that the public finds odious. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (Ku Klux Klan rally); *Snyder*, 562 U.S. 443 (picketing military funerals). By preaching Professor Kendi’s divisive doctrine on “anti-racism,” and branding anyone who disagrees with Professor Kendi as a “racist,” public schoolteachers would purport to “prescribe what shall be orthodox in politics ... or other matters of opinion” to their students, in violation of the First Amendment. *Barnette*, 319 U.S. at 642.

Moreover, schoolchildren are not all “courageous, selfreliant [adults], with confidence in the power of free and fearless reasoning.” *Whitney*, 274 U.S. at 377. “Racist” is a dirty epithet, not to be bandied about lightly, or applied to innocent children. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1425 (2020) (Alito, J., dissenting) (“To add insult to injury, the Court tars Louisiana and Oregon with the charge of racism....”). The “antiracist” framework that Professor Kendi champions creates a simplistic, zero-sum framework for complex issues of national importance, and teaching it will likely indoctrinate schoolchildren into its divisive views, leading to an “us versus them” mentality. Even for children, our Constitution “guards the individual’s right to speak his own mind” and does not permit “public authorities to

compel him to utter what is not in his mind.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989). And States have a compelling interest in eliminating racial discrimination that is the product of racist action. *Bd. of Directors of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987). The Department’s invitation to inculcate schoolchildren in Professor Kendi’s views to children cannot be squared with Congress’s directive to improve “the quality of the teaching of American history, civics, and government.” 20 U.S.C. § 6661(a). And it raises grave concerns under the First Amendment.

Thus, in addition to Proposed Priority 1’s incompatibility with its authorizing statute, funding grant proposals to encourage Professor Kendi’s radical view of advocating *in favor of* racial discrimination is likely unconstitutional. The Supreme Court has stated that “a grant of federal funds conditioned on invidiously discriminatory state action . . . would be an illegitimate exercise of the Congress’ broad spending power.” *South Dakota v. Dole*, 483 U.S. 203, 210–11 (1987). Teaching such racial discrimination in public schools may also violate students’ constitutional rights under 42 U.S.C. § 1983 and statutory rights under 42 U.S.C. § 2000d, which guarantees that “[n]o person in the United States shall, on the ground of race, color, or national origin . . . be subjected to discrimination under any program or activity receiving Federal financial assistance.”

In reconsidering its priorities, the Department may want to consider the inspirational truths expressed in America’s foundational documents:

The Declaration of Independence states: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness,” and “That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”

The Preamble of the U.S. Constitution states: “We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

The Gettysburg Address states: “It is rather for us to be here dedicated to the great task remaining before us – that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion – that

we here highly resolve that these dead shall not have died in vain – that this nation, under God, shall have a new birth of freedom – and that government of the people, by the people, for the people, shall not perish from the earth.”

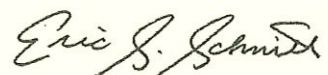
President Lincoln’s Second Inaugural Address states: “With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation’s wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.”

The Fourteenth Amendment states: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Martin Luther King, Jr.’s “I Have a Dream” speech states: “So even though we face the difficulties of today and tomorrow, I still have a dream. It is a dream deeply rooted in the American dream. I have a dream that one day this nation will rise up and live out the true meaning of its creed: We hold these truths to be self-evident, that all men are created equal.... I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character. I have a dream today.”

No doubt Professor Kendi would dismiss these inspirational ideals as expressions of white supremacy, and perhaps the Department shares that intellectually impoverished view. But, in enacting Section 6661(a), Congress codified the contrary view—*i.e.*, that America’s history reflects a progression in which her founding ideals ultimately triumph over any weaknesses and failures of her people. That statute and the Constitution do not permit the Department to launch a funding program with taxpayer dollars to force Professor Kendi’s hostile, anti-American views on America’s schoolchildren.

Sincerely,

A handwritten signature in cursive script, reading "Eric S. Schmitt". The signature is written in dark ink and is positioned above the printed name.

Eric S. Schmitt
Attorney General of Missouri